Filed 8/7/09 P. v. Rhone CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JAMAL TYRON RHONE, Defendant and Appellant.	G040050 (Super. Ct. No. FWV032768) O P I N I O N

Appeal from a judgment of the Superior Court of San Bernardino County, Michael R. Libutti, Judge. Affirmed.

Eric S. Multhaup, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Ronald Jakob and Jennifer A. Jadovitz, Deputy Attorneys General, for Plaintiff and Respondent.

An information charged Jamal Tyron Rhone with murder, in violation of Penal Code section 187, subdivision (a) (count 1).[1] It further alleged, under subdivision (a)(17) of section 190.2, the murder was committed during the commission of a robbery. Count 2 alleged second degree attempted robbery, and counts 3 and 4 alleged second degree robbery. As to each count it was alleged Rhone personally discharged a firearm pursuant to section 12022.53, subdivision (d). The information also alleged Rhone was at least 16 years old at the time of his crimes (Welf. & Inst. Code, § 707), and he committed the offenses for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)). A jury convicted Rhone of all the charged offenses and found all of the special allegations to be true. The trial court sentenced Rhone to a term of life in prison without the possibility of parole consecutive to a determinate sentence term of 43 years and four months. Rhone filed a timely notice of appeal.

Rhone claims the court erred by allowing the prosecution to exclude African-Americans from the jury and by allowing his custodial statements to be admitted. Finding neither contention has merit, we affirm the judgment.[2]

FACTS

A. Jury Selection

During jury selection, the prosecutor used peremptory challenges to excuse two African-American prospective jurors. One African-American juror remained in the venire. After the prosecution excused the two African-Americans, Rhone made a *Batson/Wheeler* motion.[3] Rhone asserted that by excusing the two African-American

---

[1] All further statutory references are to the Penal Code, unless otherwise indicated.

[2] We grant Rhone's application to file a late reply brief, and we have considered it.

[3] *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*); *People v. Wheeler* (1978) 22 Cal.3d 258.

prospective jurors, the prosecutor was exercising race-based challenges. The first African-American prospective juror the prosecutor excused was prospective Juror No. 46 (hereafter Juror 46). This juror stated she had a son who is a lieutenant with a local police department, a daughter-in-law who is a traffic officer in the same department, and a son-in-law who works with juveniles in the correctional system in Los Angeles. When defense counsel asked Juror 46 if the fact this was a homicide case would give her any problems, she indicated, "A little bit." When asked if she would have any apprehension about sitting as a juror on a homicide case, she again answered, "Yes. A little." Juror 46 was then asked if she could put aside any apprehension and be fair to both sides. This juror indicated she felt she could put her feelings aside, but she was not sure in this type of case. Juror 46 confirmed based on the type of the case, it might be difficult for her to serve as a juror. The prosecutor did not ask this juror any questions.

The second African-American the prosecutor excused was prospective Juror No. 67 (hereafter Juror 67). The court and counsel questioned Juror 67. When asked by the court if he could be fair and impartial to both sides, Juror 67 responded, "I'll do the best I can." This juror indicated he had no association with law enforcement and no involvement in criminal justice. And he stated, "I'll try to be as fair as possible." When asked by defense counsel if he could hold the prosecution to the requisite burden of proof, Juror 67 stated, "I just need the evidence." When asked about his ability to judge the credibility of witnesses, he responded, "I'll make correct decisions as best as possible." When the prosecutor began questioning Juror 67, the following colloquy occurred:

"[Prosecutor]: Now you said that you would try to be as fair as possible.

"[Juror]: Yes, sir.

"[Prosecutor]: What exactly do you mean by that?

"[Juror]: Show me the truth. Show me the proof. That's it.

"[Prosecutor]: Now, regardless of what proof I show you, let's say I show you a little proof, or I show you a lot of proof, does that have any bearing on whether you can be fair or not?

"[Juror]: No, sir.

"[Prosecutor]: When you say, as fair as possible I guess I'm trying to figure out what you mean when you say 'as'—the 'as possible' part. Some people say, you know, I can't be fair because it's this kind of case or this kind of involvement or some people say, you know –

"[Juror]: I have to weigh all the evidence in the long run, right?

"[Prosecutor]: Yes.

"[Juror]: All right, then. That's it.

"[Prosecutor]: So once you hear all the evidence, you feel you can be fair?

"[Juror]: Yes, sir.

"[Prosecutor]: Okay. And if the evidence I present to you convinces you beyond a reasonable doubt that . . . Rhone is guilty, would you have any problems returning [a verdict of] guilty?

"[Juror]: No, sir."

There was then a discussion about whether Juror 67 would have a problem deliberating with the other jurors even if he did not like some of them. The juror assured the prosecutor he could work with the other jurors. As the prosecutor concluded his questioning, the flowing colloquy occurred:

"[Prosecutor]: Anything that I've discussed with the other jurors before you sat, such as the fact of circumstantial evidence versus direct evidence, does that cause you any concern?

"[Juror]: I prefer direct evidence.

"[Prosecutor]: When you say you 'prefer direct evidence,' would you—let's say if you don't have direct evidence, would you have any problems returning a verdict of guilt?

"[Juror]: If there's more evidence involved with it, yes, I can come back with guilty, you know, true answer.

"[Prosecutor]: If it's not direct, you won't be able to do it?

"[Juror]: In my case, no.

"[Prosecutor]: And then, how about the issue of perhaps having made a deal with someone to testify against someone else. Does that cause you any concern?

"[Juror]: I don't like that, no.

"[Prosecutor]: You don't like that. That's going to give you another concern?

"[Juror]: Yes.

"[Prosecutor]: And would – these kinds of concerns, would it be fair to say these kinds of concerns that you took into account when you say you try to be as fair as possible?

"[Juror]: Yes, sir."

The prosecution passed for cause but then requested permission to ask one last question.

"[Prosecutor]: Given all of that, do you believe you can be fair and impartial to both sides?

"[Juror]: Do the best I can."

The court then interjected:

"[The court]: Let me throw in, for all the sake of all folks. All you folks here, the court will read an instruction. I will. And it capsulated, says, direct evidence and circumstantial evidence are of equal value in the eyes of the law. Neither is greater than the other. You would be required to follow the law in this case. So really what it

comes down to is if that's the law, in short, as to the circumstantial evidence, and it goes on a little bit more in depth. But that's the basic point. Direct and circumstantial are equal value in the law. Neither is greater than the other. That's the key language of that law. If that's it, what each side needs to know is that are you going to be able to follow that and if you can't, you have to let them know."

The prosecution resumed:

"[Prosecutor]: Does what the judge just told you, as far as what the law is, is that going to have—does that make any difference as far as you wanting direct evidence?

"[Juror]: Excuse me. You said they are both equal, correct?

"[Prosecutor]: The law the judge will tell you, they're both equal, yes.

"[Juror]: I'm confused, then. I'm sorry. If they're equal, what's the problem?

"[Prosecutor]: There's nothing to be sorry about.

"[Juror]: If they are equal, I don't understand.

[Prosecutor]: So let's just assume that the law the judge will give you is that they are both equal. Do you still have a little problem with that concept? You still would prefer to have direct evidence?

"[Juror]: Yes, sir."

The prosecution later excused Jurors 46 and 67. Rhone made a *Batson/Wheeler* motion. The court found a prima facie case, and directed the prosecutor to explain his reasons for challenging the African-American jurors. As to Juror 67, the prosecutor explained that even after the court explained direct and circumstantial evidence were entitled to equal weight, Juror 67 still indicated he had problems with circumstantial evidence. Regarding Juror 46, the prosecutor said he would have "loved to have kept her because she has a lot of relatives in law enforcement." But she also indicated a strong apprehension about serving on a jury like this. He excused her because

he believed she was reluctant to be a juror on a murder case, and feared she would be resentful if she was forced to stay on the jury. He believed this might affect her ability to be fair.

In denying Rhone's *Batson/Wheeler* motion, the court stated it was very clear Juror 67 had a problem with direct and circumstantial evidence. The court relied on not just what the juror said, but also on his body language. Regarding Juror 46, the court agreed this juror expressed considerable reservation about sitting on a murder case. The court accepted the prosecutor's explanations and concluded there was no systematic exclusion occurring.

B. Trial

Daniel Guzman, a 14-year-old high school student, took a shortcut home from school through a park with his friend, Noe Flores. In the park, they were confronted by three male African-American youths, who were later identified as Rhone, Frederick Stewart, and Trayvon Patterson. The youths demanded Daniel and Noe[4] give them money. At first, Daniel gave them only $1, but then one of the three pulled out a gun and asked for the rest of the money. Daniel responded by surrendering all the money he had. One of the youths went through Noe's backpack, but did not take anything. Noe was also confronted with the gun and handed over his money.

Shortly after the encounter with Daniel and Noe, the three African-Americans came upon Fidencio Guzman in the park. Rhone approached Fidencio and forcefully said, "'[C]ome out the pockets.'" Stewart patted down Fidencio's pockets, but found nothing. Initially, Fidencio was seated leaning up against a wall, but later attempted to stand up. As he did, Rhone displayed his gun. When the gun came out, Patterson fled. A few seconds after he started running, Patterson heard sounds

[4] We use first names to avoid confusion between two of the victims who share the same family name.

"like a pop." Similar to the sound a cap gun would make. The sound appeared to come from the area where he had left Rhone and Stewart.

Ontario Police Officer Byron Lee and Detective David Nicholson responded to the shooting at the park. Lee located Fidencio who was sitting up and conscious suffering from two apparent gunshot wounds. Fidencio later died as a result of his injuries.

Bob Whitacre was parked across the street from the park on the day Fidencio was shot. As he sat in his car, he heard two or three "pops" in the distance. The "pops" sounded like they were made by a heavy duty firecracker or a gun. After hearing the "pops," Whitacre saw three African-American young men wearing ski masks running westbound through the park and then down J Street. The same day Steve Blacksher was standing in front of a house on J Street. He observed three African-American males running down the street. Halfway down the street, they crossed over and slowed to a fast-walking pace. As they proceeded down the street, they looked back several times.

Several witnesses testified about statements Rhone made at school the day after the shooting. Stewart testified when he and Patterson ran into Rhone at school, Rhone asked if they had seen the news the previous night. When they indicated they had not seen the news, Rhone told them the victim, the old man, had died and he advised them not to tell anyone about what had happened. Patterson gave a similar account of the conversation at school. Ern'isa Truman recounted a conversation she had with Rhone. Rhone said he had gone to the park with Stewart and Patterson to rob kids of money. Reluctantly, Truman admitted Rhone had told her he could not leave the old man in the park, and had shot him. Rhone also made statements to Jasmine Miller about the events that took place in the park. Jasmine heard Rhone say he was in the park with Stewart and Patterson robbing people. They started to rob an old man, and he shot the old man.

The prosecution also offered the testimony of a gang expert. We need not recite the details of this testimony because it is not relevant to the claims made by Rhone on appeal.

Angelica Fernandez testified for the defense. She had known Rhone for about a year and had been dating him for two days prior to the day of the shooting. On the day of the shooting, Rhone walked her home after school and remained with her throughout the afternoon and early evening. Frances Sepulveda, Angelica's mother, also testified for the defense. Sepulveda said she knew Rhone was her daughter's friend. She confirmed Rhone had spent the afternoon and early evening with her daughter.

Rhone testified that on the day of the shooting, he left the school grounds with Angelica when school let out around 2:30 p.m., and they went directly to Angelica's house. He remained with Angelica until about 7:00 p.m., when Angelica's mother drove him home. He denied being anywhere near the park that day or having anything to do with the murder. He further denied he had ever fired a gun, or had a gun. Confronted with the testimony of the students who claimed he had admitted to being involved in crimes at the park, Rhone denied making the statements. He opined the witnesses had lied because they did not like the fact he had a Hispanic girlfriend.

Rhone was asked about potentially incriminating telephone conversations he had with Angelica and a friend. Rhone provided an innocent explanation for each conversation.

In rebuttal, the prosecution called Detective Alfredo Parra. Parra interviewed Rhone when he was arrested, the day after the shooting. No motion was made prior to trial to exclude Rhone's statements to Parra, but when the prosecution announced its intention to call Parra to testify about Rhone's statements, the defense objected. Initially, Rhone made a *Miranda*[5] objection. The court responded by

[5] *Miranda* v. *Arizona* (1966) 384 U.S. 436 (*Miranda*).

suggesting the statements, even if obtained in violation of *Miranda,* would be admissible in rebuttal for impeachment purposes if the statements were not coerced. The prosecution agreed the statements could be admitted. Defense counsel responded even if there was no *Miranda* bar to the admission of the statements, the statements should be excluded on a different ground. Rhone had requested to speak to his parents and counsel asserted the law required the interview to cease once a juvenile made a request to speak with his parents. The prosecution disagreed such was the state of the law.

Parra first testified outside the presence of the jury and was asked whether Rhone had waived his *Miranda* rights. Parra confirmed Rhone had affirmatively waived his *Miranda* rights. The prosecutor also inquired as to Rhone's requests to speak with his parents. At the conclusion of Parra's testimony, the court watched the videotape of the interview and then heard further argument.

Rhone cited *People v. Burton* (1971) 6 Cal.3d 375 (*Burton*), and argued Rhone's request to speak with his parents constituted an invocation of his Fifth Amendment rights and, therefore, once Rhone made the request, officers were required to end the interview. The prosecution cited *Fare v. Michael C.* (1979) 442 U.S. 707 (*Fare*) and *In re Aven S.* (1991) 1 Cal.App.4th 69 (*Aven*), for the proposition the court must consider the totality of the circumstances in deciding whether the statements should be excluded. Stating it was relying on the *Fare* case and considering the totality of the circumstances, the court ruled the statements admissible.

A recording of the interview was played for the jury. During the recorded interview, Rhone repeatedly denied being at the park and maintained he was with Angelica when the shooting took place. He consistently denied any knowledge of the events that took place in the park. Numerous times during the interview Rhone requested to speak with his parents. He was able to provide telephone numbers for Angelica, his parents, and his grandmother, but he was unable to provide any addresses including his grandmother's where he was residing.

DISCUSSION

A. Denial of Batson/Wheeler Motion

Rhone contends the court erred in accepting the prosecutor's proffered reasons for excusing Juror 67. He points out a number of other jurors expressed similar concerns about circumstantial evidence, yet the prosecution did not excuse them. We need not speculate as to why other jurors were not excused. Our duty is to decide whether the prosecution excused Juror 67 for discriminatory reasons. As our Supreme Court has stated, "[T]he question is not whether we as a reviewing court find the challenged prospective jurors similarly situated, or not, to those who were accepted, but whether the record shows that the party making the peremptory challenges honestly believed them not to be similarly situated in legitimate respects." (*People v. Huggins* (2006) 38 Cal.4th 175, 223.)

The trial court is in the best position to observe the demeanor and manner of the jurors in responding to questions and to judge the credibility of the prosecutor's rationale for exercising a challenge. Accordingly, the trial court's finding as to the prosecutor's motivation in exercising challenges is entitled to great deference on appeal. (*People v. Reynoso* (2003) 31 Cal.4th 903, 917-918.)

Here, the reasons the prosecutor gave for excusing Juror 67 were plausible and supported by the record. In addition to considering the answers upon which the prosecutor relied, the court cited Juror 67's body language as indicative of his concerns with circumstantial evidence. Remarkably, even after the court advised Juror 67 the law required circumstantial and direct evidence be given equal consideration, Juror 67 indicated he would still have a problem. Juror 67 essentially said he would be unable to follow the law as instructed. We find no error.

Rhone contends the court also erred in accepting as reasonable the prosecutor's reasons for excusing Juror 46. He contends the prosecutor exaggerated Juror 46's statements regarding her reservations about serving on a homicide case, and

suggests the fact the prosecutor did not ask Juror 46 any questions indicates a lack of credibility with respect to the prosecutor's explanation for excusing Juror 46. We know of no authority, and Rhone cites none, requiring a prosecutor to ask questions of a juror personally. Rather, the prosecutor may rely on the state of the record even if the information was elicited by the court or defense counsel.

It was clear from Juror 46's answers she had reservations about sitting as a juror on a homicide case. Rhone believes her answers, when taken as a whole, did not indicate the juror had a strong apprehension about serving on a homicide jury as the prosecutor stated. Reasonable attorneys hearing the same answers to questions may reach different conclusions as to the import of the answers. Such is the case here. The prosecutor simply believed Juror 46's concerns to be greater than did defense counsel. The court did not need to inquire further of the prosecutor based on the information Juror 46 had provided. A prosecutor's reasons for exercising a peremptory challenge "need not rise to the level justifying exercise of a challenge for cause." (*Batson, supra,* 476 U.S. at p. 97.) Our Supreme Court has found permissible a juror's excusal based on a hunch so long as there is no evidence the challenges were based on impermissible group bias. (*People v. Box* (2000) 23 Cal.4th 1153, 1186, fn. 6.) "We presume that a prosecutor uses peremptory challenges in a constitutional manner and give great deference to the trial court's ability to distinguish bona fide reasons from sham excuses. [Citation.] So long as the trial court makes a sincere and reasoned effort to evaluate the nondiscriminatory justifications offered, its conclusions are entitled to deference on appeal. [Citation.]" (*People v. Burgener* (2003) 29 Cal.4th 833, 864.) We find no error in the court's ruling as to Juror 46.

B. Admission of Rhone's Custodial Statements

Rhone contends the trial erred in failing to view his repeated requests to speak with his parents as invocations of his right to remain silent. He also contends because his requests to speak with his parents amounted to invocations of his rights under

Miranda, supra, 384 U.S. 436, permitting the prosecutor to cross-examine him about his requests to call his parents was a due process violation. He relies on the United States Supreme Court's ruling in *Doyle v. Ohio* (1976) 426 U.S. 610, 617 (*Doyle*), holding due process is violated when a defendant's assertion of his right to remain silent is introduced at trial as evidence of guilt.

Rhone asserts as a minor he was entitled to speak to his parents before questioning. Because his repeated requests to speak to his parents were denied, his statements were obtained in violation of *Burton*, *supra*, 6 Cal.3d 375. *Burton* held a minor's request to consult with a parent made at any time prior to or during questioning, must in the absence of evidence demanding a contrary conclusion, be construed to indicate the minor suspect desires to invoke his Fifth Amendment privilege. The Attorney General argues *Fare, supra,* 442 U.S. at pages 722-724, sets forth the proper test and no *Miranda* violation occurred. *Fare* articulated the "totality of the circumstances" test. (*Fare, supra,* 442 U.S. at pages 722-724*Id.* at p. 725.)

We agree with the Attorney General that *Fare* controls our analysis. When a juvenile requests to see a parent, interrogation need not necessarily cease. (*People v. Hector* (2000) 83 Cal.App.4th 228, 237.) Rather, we must look at the totality of the circumstances to determine whether the juvenile, in asking to speak to his parents, invoked his *Miranda* rights. "The totality approach permits—indeed, it mandates—inquiry into all the circumstances surrounding the interrogation. This includes evaluation of the juvenile's age, experience, education, background, and intelligence, and into whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights. [Citation.]" (*Fare, supra*, 442 U.S. at p. 725.)

A review of Rhone's interaction with Parra during the interview does not reveal any lack of understanding on Rhone's part regarding the *Miranda* warnings he was given. Rhone does not shy away from any of Parra's questions or in any other way

suggest he needs the support of a parent to understand his rights or appreciate the nature and seriousness of the questioning. During the interview, Rhone appeared to be a high school student of average intelligence. The trial court described the tenor of the interview to be "quite low-key," and we agree with that assessment. Throughout the questioning, Rhone consistently maintained his innocence. As the trial court observed, he did not "appear to be bothered by the casual conversation" concerning the events at the park. These circumstances do not support a finding Rhone's requests to speak with his parents amounted to an invocation of his right to remain silent or his right to speak with an attorney. We find no error in the court admitting Parra's testimony.[6]

DISPOSITION

The judgment is affirmed.

O'LEARY, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

ARONSON, J.

[6] Because we have concluded Rhone's requests to speak with his parents were not the equivalent of an invocation of his *Miranda* rights, we find no merit in Rhone's contention the prosecutor committed *Doyle* error in questioning him during cross-examination. (*Doyle, supra,* 426 U.S. 610.)